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No. 85-1548 (2)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

CLIVE DILLON,

Petitioner,

v.

RAYMOND LUTTERMAN, in his official capacity and as an individual and the CITY OF POWELL, a municipal corporation,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

WHETHER THE COURT OF APPEALS FOR THE TENTH CIRCUIT PROPERLY HELD THAT THE DISTRICT COURT HAD SATISFIED THE SEPARATE DOCUMENT REQUIREMENT OF FED. R.CIV.P. 58.

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SUMMARY OF ARGUMENT

Petitioner fails to raise an issue worthy of this Court's review. The Tenth Circuit properly construed Rule 58. Moreover, the decision is on a narrow, isolated issue, which is unlikely to recur in a manner such that this Court's guidance is necessary.

Petitioner's Rule 54 argument is not properly before the Court. Additionally, the Tenth Circuit's decision in this regard is akin to an internal operating procedure, and does not warrant review.

ARGUMENT

I. PETITIONER FAILS TO PRESENT AN ISSUE WORTHY OF THIS COURT'S REVIEW PURSUANT TO A WRIT OF CERTIORARI.

Petitioner Clive Dillon ("petitioner" or "plaintiff") attempts to present two questions for consideration by this Court on a writ of certiorari. First, he claims that in its order of January 30, 1986, the Tenth Circuit "has so far departed from the accepted and usual course of judicial proceedings so as to make the mechanically applied 'separate document' rule (Rule 58 Fed.R.Civ.P.) a nullity." Petition at 5. Second, plaintiff attempts to challenge the Tenth Circuit's decision of June 12, 1985, dismissing his first appeal because of the premature filing of the notice of appeal. Neither of these issues warrants review by this Court. Additionally, plaintiff is untimely in his attempt to gain review of the ruling regarding the premature notice of appeal.

II. THE TENTH CIRCUIT'S RULE 58 DECISION PRESENTS A NARROW, ISOLATED ISSUE, WHICH IS UNLIKELY TO RECUR AND DOES NOT WARRANT REVIEW.

The Tenth Circuit's decision of January 30, 1986 (hereafter referred to as the "Rule 58 decision") does not present an issue worthy of this Court's attention. Contrary to plaintiff's assertion, the Rule 58 decision is not a departure from the accepted and usual course of judicial proceedings. The decision was based upon a straightforward application of Rule 58 to the particular facts of this case. The issue was such that the Tenth Circuit did not require oral argument, nor was the decision published. The court was confronted with the simple question of whether the district court, under the particular circumstances of this case, had complied with the requirements of Rule 58.

A review of the order of the district court dated September 27, 1984, which is attached to the petition as Appendix D, reveals clear compliance with Rule 58. The district court had entered summary judgment on behalf of defendants on August 29, 1984. Because of the pendency of defendants' counterclaim, this summary judgment order was not immediately appealable. Therefore, plaintiff sought a Rule 54(b) determination. On a separate document, Judge Brimmer stated that his previous summary judgment decision was a final judgment. This order clearly satisfied the requirements of Rule 58. That rule, by its own terms, is subject to the provisions of Rule 54(b). In the context of this case, the separate document requirement was satisfied. More importantly, the purpose behind Rule 58 — clear indication of a final, appealable judgment — was met. *See generally Diamond* v. *McKenzie,* 770 F.2d 225, 231-35 (D.C. Cir. 1985) (Robinson, C.J., concurring) (discussing history of Rule 58 and satisfaction of separate document requirement).

The Tenth Circuit's proper analysis of this isolated procedural issue is not one this Court should review. A ruling of this type is unlikely to recur, nor have significant precedential impact. The only reason Rule 58 became an issue in this case was because of plaintiff's premature notice of appeal and failure to file a timely notice following the September 27 order. Only when it became apparent that his first appeal might be dismissed did plaintiff question whether Rule 58 had been complied with by the district court. This sui generis situation is not one to which this Court should devote its time and energy.

III. PETITIONER IS UNTIMELY IN HIS EFFORTS TO SECURE REVIEW OF THE TENTH CIRCUIT'S JUNE 12, 1985, DECISION REGARDING HIS PREMATURE NOTICE OF APPEAL.

In his statement of jurisdiction, plaintiff states that he is seeking review of the Tenth Circuit's Order and Judgment entered on January 30, 1986. This is the only judgment from which plaintiff filed a timely petition. The order of January 30 dealt solely with the question of Rule 58. Yet, plaintiff has inserted into his petition the question determined in the Tenth Circuit's decision of June 12, 1985, regarding Rule 54(b). The time for seeking a writ of certiorari from that judgment expired long before the filing of the present petition. Instead of asking this Court to review the June order, plaintiff went back to the district court and sought a Rule 58 order. The Tenth Circuit's affirmance of the district court's denial of that motion is the only matter timely brought before this Court.

IV. IF PROPERLY BEFORE THIS COURT, THE QUESTION OF THE TIMELINESS OF PETITIONER'S FIRST APPEAL DOES NOT WARRANT REVIEW.

After the entry of summary judgment for defendants, plaintiff filed his initial notice of appeal. Afterwards, he sought and received a determination from the district court that the summary judgment decision was an appealable order pursuant to Rule 54(b). The Tenth Circuit dismissed plaintiff's first appeal because he had filed his notice before securing a Rule 54(b) determination.

When an appeal is filed prematurely because of failure to comply with Rule 54(b), a court of appeals has a number of options. First, it can dismiss the appeal and require that

the notice be filed in the proper sequence following the Rule 54(b) order. Second, it can hold the appeal on its docket until such time as any defect is cured by an appropriate order from the district court. Third, it can remand the case for entry of an appropriate order by the district court, after which the case will be returned to the court of appeals. None of these options conflicts with Rule 54(b) or Fed.R.App.P. 4(a)(2). The latter rule deals with a notice of appeal filed after the announcement of a judgment, but before its entry. To benefit from Rule 4(a)(2) here, plaintiff would need to have filed his notice after the Rule 54(b) determination, but before entry of same on the court's docket. Instead, plaintiff filed his notice of appeal before even requesting a Rule 54(b) order.

The Tenth Circuit has chosen the first option discussed above. This choice is clear from precedents of the Tenth Circuit. *See, e.g., A.O. Smith Corp.* v. *Sims Consolidated, Ltd.*, 647 F.2d. 118 (10th Cir. 1981). The fact that other circuits have chosen different options does not warrant a grant of certiorari. In fact, this Court has denied certiorari recently in a case challenging an identical application of Rule 54(b) by the Tenth Circuit. *See Burlington Northern R.R.* v. *Clay*, No. 84-1162, *cert. denied*, 53 U.S.L.W. 3634 (U.S. March 4, 1985). The Tenth Circuit's position is, in effect, little different than an internal operating procedure. This is not the type of question that warrants resolution by the Supreme Court. Therefore, despite the conflict between the circuits, the Court should deny the petition for writ.

CONCLUSION

For the foregoing reasons, respondents respectfully submit that the petition for a writ of certiorari should be denied.

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